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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 306

ESTATE OF LLOYD E. CRELLIN, deceased, CENTRAL BANK, a corporation, executor, LAURA C. FITZGERALD, MONA L. CRELLIN, ETHEL C. HALL and JANE C. EVERETT,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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ESTATE OF LLOYD E. CRELLIN, deceased, CENTRAL BANK, a corporation, executor, LAURA C. FITZGERALD, MONA L. CRELLIN, ETHEL C. HALL and JANE C. EVERETT,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners, Estate of Lloyd E. Crellin, deceased, Central Bank, a corporation, executor, Laura

C. Fitzgerald, Mona L. Crellin, Ethel C. Hall and Jane C. Everett, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on the 6th day of May, 1953, which judgment affirmed the decision of the Tax Court of the United States in *Estate of Lloyd E. Crellin, Deceased, Central Bank, a corporation, Executor, Laura C. Fitzgerald, Mona L. Crellin, Ethel C. Hall and Jane C. Everett, Petitioner, v. The Commissioner of Internal Revenue, 17 TC 781.*

OPINION BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit is officially reported in 203 F. 2d page 812.

JURISDICTION.

1. The judgment of the Court of Appeals was entered on May 6, 1953 and the order denying a petition for rehearing was entered on June 3, 1953. The jurisdiction of this Court is invoked under Title 28 *United States Code,* Sec. 1254(1).

2. The basis upon which it is contended that the Supreme Court has jurisdiction herein, and the decisions which support such jurisdiction are, in part, as follows:

(a) The Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court; (*Rule*

38(5)(b) of the Rules of the Supreme Court; Conn. Ry. & Lighting Co. v. Palmer, 305 U.S. 493, 83 L.Ed. 309; 59 S.Ct. 316).

(b) A writ of Certiorari will issue on a showing of importance to the administration of the revenue laws; (*Commissioner v. Bedford,* 325 U.S. 283, 65 S.Ct. 1157, 89 L.Ed. 1611, at page 1617).

(c) The Court of Appeals has decided a Federal question in a way probably in conflict with the applicable decisions of this Court; (*U.S. v. Miller,* 317 U.S. 369, 318 U.S. 798, 87 L.Ed. 336, 1162, 63 S.Ct. 276, 557; and cases collected in 54 *Am. Jur.,* p. 880, Sec. 242, Note 16).

(d) The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter. (*Rule 38(5)(b) of the Rules of the Supreme Court; U. S. v. Lewis,* 340 U.S. 590, 95 L.Ed. 560, 71 S.Ct. 522).

(e) The Court of Appeals has decided an important question of local law in a way probably in conflict with the applicable local decisions; (*Rule 38(5)(b) of the Rules of the Supreme Court; Cities Service Oil Co. v. Dunlap,* 308 U.S. 208, 84 L.Ed. 196, 60 S.Ct. 201).

STATEMENT OF MATTERS INVOLVED.

This is an income tax case. The jurisdiction of the Court of Appeals for the Ninth Circuit was invoked by petitioners to review a decision of the Tax Court

of the United States, which decision is reported in 17 TC 781.

All of the facts in the case were stipulated before the Tax Court which found the facts as stipulated to be true. (R. 33.)*

The Board of Directors of Thomas Crellin Estate Co., a California corporation, classified as a personal holding company, under I.R.C., Sec. 501 were aware of its status as such. In 1946, the corporation had on hand $100,000 in capital gains after provision for the alternative tax under I.R.C. Sec. 117(c)(1), *which sum the Board desired to reinvest, unless they were required to distribute the same as dividends in order to avoid onerous personal holding company penalty surtaxes prescribed by I.R.C., Sec. 500.* (R. 8-9.)

(Personal holding company surtaxes have been characterized by the Courts in the Second, Sixth and Tenth Circuits as a *penalty* tax, intended to *force distribution of profits. Knight Newspapers Inc. v. Comm.* (C.C.A. 6), 143 F. 2d 1007, 1010; *General Securities Co. v. Comm.* (C.C.A. 10), 123 F. 2d 192; *Pembroke Realty & Sec. Co. v. Comm.* (C.C.A. 2), 122 F. 2d 252.)

On the basis of erroneous advice received by them from an experienced certified public accountant and tax practitioner consulted by them, *the Board mistakenly believed itself to be in duty bound to declare and pay a dividend lest the corporation incur personal holding company penalty surtaxes* and in June of

*"R" denotes Transcript of Record.

1946, declared and paid a dividend of $99,990 to the corporation's five shareholders, the petitioners herein. (R. 8-11.)

The Tax Court found that the directors would not have paid the dividend but for their mistaken belief. (R. 37.)

Later in 1946, on discovering the error of the advice which they had received and which had induced the mistaken belief which had caused them to declare and pay the dividend (*thus thwarting their original purpose to reinvest the corporation's capital gains*) *the Board* (in December, 1946) *rescinded the dividend, demanded its repayment and in 1946 the petitioners* (the five shareholders of said corporation) *repaid the dividend to the corporation in recognition of the fact that the Board would not have declared and paid the dividend, but for the inducement of the erroneous advice which led them mistakenly to act, in the manner and for the reasons above stated.* (R. 11-15.)

The rescission of the dividend was *bona fide* and was *lawfully accomplished under California law* and for a *legitimate business purpose.*

Nevertheless, the Court of Appeals in affirming the Tax Court's decision denied petitioners the right to exclude from their gross income of 1946, the dividend thus *declared, paid,* and lawfully *rescinded* and *repaid* by them in 1946 on the ground that the rescission was *voluntary* and could not have been *compelled* and that the California Code provision authorizing rescission by consent of the parties was not applicable to dividends.

The Court of Appeals arrived at these conclusions despite the fact that it *recognized and referred to but disregarded,* the decision of the California Supreme Court in *Meyers v. El Tejon Oil & Refining Co.,* 29 Cal. 2d 184, which holds that a dividend CAN be revoked with stockholders' consent and California Civil Code Sec. 1689, Subdivision 5, providing that a contract CAN be rescinded by consent of the parties thereto.

Although, as shown above, the Tax Court found as a fact that the shareholders repaid the dividend on the demand of the corporation in recognition of the Board's mistaken belief which induced them to declare and pay the dividend, and hence did *consent to the rescission,* the Court of Appeals referring to the California Code Section which permits rescission by *consent* said:

> "* * * We, in accordance with the Tax Court, *do not think these provisions are applicable in the case of corporate dividends.*"

Despite the fact that there was no fraud or illegality or unlawful tax avoidance involved and that it is the law of California that a *dividend can be rescinded with the shareholders' consent* and that in this case *there was a lawful rescission of the dividend with consent of the shareholders to accomplish a legitimate business purpose,* the Court of Appeals upheld the Tax Court because *it said it did not think* that these *admitted* provisions of the California law of rescission were applicable to dividends and that the rescission was *voluntary.*

Why it did not think that these provisions were applicable, the Court does not say.

The Court did say:

> "* * * We recognize that action may be taken by a party which results in tax saving *providing the action is authorized by law,* * * *".

Even though the dividends were *received* under a claim of right, they were not *retained* by the taxpayers, (*Ford v. Comm.* (C.C.A. 6) 51 F. (2d) 206, 207; *U. S. v. Lesoine* (C.C.A. 9), 203 Fed. (2d) 123, 126) but were *repaid* by them upon the rescission, in the *same year* in which they were received and hence we are not involved in a conventional "claim of right" tax case.

QUESTIONS PRESENTED.

Bearing in mind the facts as above stated, the following questions are here presented for consideration.

The GENERAL question involved, which appears not to have been settled by this Court, is:

> *Question 1.* Where, in the same year in which he receives income, a taxpayer *voluntarily* repays it, in whole or in part, *in good faith* and *in a lawful transaction,* having a *legitimate business objective,* must he still include the refunded income in his gross income for the year?

The Court of Appeals' Opinion having stated:

> "* * * It is the year in which a *legally rescindable* dividend is returned that determines when the deduction from gross income may be taken,"

and

> "when *payment* and *return* of the dividend *occur within the same taxable year,* it is reasonable to view the transaction as involving no increment to gross income, rather than an increment to gross income plus a deduction",

the *general* question is broken down into two additional and SPECIFIC questions:

> *Question 2.* Is a rescission of a *dividend,* lawfully accomplished, in good faith, for a legitimate business reason, to be *disregarded* and is the taxpayer required to include the *dividend* which he has *repaid* in the year that he received it in his gross income for that year, because the lawfully accomplished rescission was VOLUNTARY and not one which could have been compelled?
>
> *Question 3.* If a lawful rescission of a *dividend,* made in good faith for a legitimate business reason is to be disregarded because it is made VOLUNTARILY and if the taxpayer is required to include the refunded dividend in his gross income, what is it that distinguishes the *voluntary* repayment of a *dividend* under the conditions here involved from voluntary repayments of other types of income, such as *salary, rent, interest* or *business profits* under similar conditions which *do* justify exclusions from gross income?

Since in this case all transactions took place within the *same taxable year* no violence was done to the principle of annual accounting which underlies our Federal tax system and which has been involved in the many *"claim of right"* cases decided by this Court where an adjustment of an *earlier* year's income is sought on account of repayment in a *later* year. (See

United States v. Lewis, 340 U.S. 590, 95 L.Ed. 560, 71 S.Ct. 522; *Healy v. Commissioner,* 97 L.Ed. (Adv.) 611, 73 S.Ct. 671.)

In presenting the above questions we have in mind the oft cited ruling of this Court in *Gregory v. Helvering,* 293 U.S. 465, 469, 55 S.Ct. 266, 267, 79 L.Ed. 596, where it is said:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or *altogether avoid them, by means which the law permits, cannot be doubted.*"

(See the cases collected in *Riddlesbarger v. Commissioner* (C.C.A. 7) 200 F. 2d 165, 175.)

We are not here dealing with cases like *Leicht v. Commissioner* (C.C.A. 8) 137 F. 2d 433 (where sums admittedly received as *salary* and *rent* were changed from payments of *income* to payments of *principal,* a plain case of "tax juggling" intended "to lift the Federal tax hand" from income) or *Soreng v. Commissioner* (C.C.A. 7) 158 F. 2d 340 (where dividends paid to taxpayer were turned back to corporation pursuant to taxpayers' contract with a third party and thus availed of by taxpayers to purchase the corporation's common stock.)

REASONS FOR ALLOWANCE OF WRIT.

A writ of certiorari should be issued to review the judgment of the Court of Appeals for the Ninth Circuit for each of the following reasons:

1. The decision of the Court below is in conflict with the decision of the Court of Appeals of the

Eighth Circuit in *Stern-Slegman-Prins Co. v. Comm.* (C.C.A. 8) 79 F. 2d 289, a case cited and relied on in a number of leading cases in the Board of Tax Appeals and in the Tax Court.

2. The decision of the Court below has decided an important question of income tax law contrary to well established decisions of the Board of Tax Appeals and the Tax Court,—an important question which has not been, but should be settled by this Court.

3. The settlement by this Court of the right of a taxpayer to make an adjustment of his gross income to reflect a bona fide, lawful *voluntary* settlement or adjustment, undertaken for a valid business reason is important to the administration of the revenue law.

4. The decision of the Court below has decided an important question of local law contrary to the decision of the Supreme Court of California in *Meyers v. El Tejon Oil & Refining Co.*, 29 Cal. 2d 184, 174 Pac. 2d 1, and Sec. 1689, Sub. 5 of the *Civil Code of California.*

CONCLUSION.

For the reasons stated above, petitioners pray that their petition for a writ of certiorari be granted.

Dated, Oakland, California,
August 26, 1953.

Respectfully submitted,
CHARLES A. BEARDSLEY,
Attorney for Petitioners.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The bases of this Court's jurisdiction are set forth in the petition for writ of certiorari.

The error of the Tax Court and of the United States Court of Appeals has been indicated.

Clearly, the rescission in California of a dividend, in good faith and in conformity to California law and

for the accomplishment of a legitimate business purpose, should not be disregarded merely on the ground that it was accomplished *voluntarily* and because the Court did not think that the California Code provision permitting rescission by consent of the parties was applicable to *dividends.*

What caused the Court to single out *dividends* from all other types of income has not been shown as stated.

Professor Ballantine in his work on *Corporations* (1946) Sec. 236 says that:

> "The rule against revocation of a cash or property dividend once declared by the directors *rests on grounds of policy* and *possible change of position* of investors rather than on contract."*

In the case at bar, *there were only five shareholders* and *they all consented to the rescission of the dividend.*

There is a rule of law, as old as the Common Law itself, set forth in *California Civil Code,* Sec. 3510:

> "When the reason of a rule ceases, so should the rule itself"

and Section 3515 of the same Code declares:

> "He who consents to an act is not wronged by it."

Surely, there was no reason for disregarding a bona fide and lawful *rescission by consent,* undertaken for a legitimate business reason.

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*All emphasis herein is by counsel.

POINTS AND AUTHORITIES.

I.

THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

In *Stern-Slegman-Prins Co. v. Comm.* (C.C.A. 8) 79 F. 2d 289, salaries of the officers of the corporation had been fixed by a resolution adopted by the board of directors for each of the years under consideration. Before the end of each taxable year involved, the board of directors took action on the matter of these officers' salaries and for the year 1929 each officer's salary was *reduced* by the sum of $5,000.00 and for the year 1930 each officer's salary was *reduced* by the sum of $3,500.00. The corporation here claimed that these deductions, *acquiesced* in by the officers were "donations" by the officers to the corporation. The Court said (p. 291):

> "* * * At least, by this action *acquiesced in by the officers* the corporation was relieved from making such payments."

However, the Court held that the amount of the alleged "donations" by the officers were not deductible from the corporation's income since the corporation had been relieved from making such payments. In its opinion the Court said (p. 292):

> "In the circumstances of this case, the officers being equally interested financially in the welfare of the corporation, it seems clear that *during the taxable year* the corporation certainly, *with the*

> *consent of its officers,* had a right to readjust these salaries and the officers had a right to waive their claims to the salaries as fixed by a prior resolution, and as a result of the action of the board and the waiver of the officers, the corporation was relieved from the obligation of paying these salaries and hence, not having actually paid the salaries and being relieved from any obligation so to do, it is *not entitled to claim these amounts as deductions* from its income as 'ordinary and necessary expenses paid or incurred during the taxable year.' "

The Court thus overruled the contention of the petitioner:

> "that 'the actions of petitioner and its corporate officers *were not in legal effect an adjustment downward of the officers' salaries* but were in legal effect *gifts* by the officers to the corporation and that the salaries were not reduced.' "

It is to be noted that this case was followed by one of the leading cases in the Board of Tax Appeals, *Albert W. Russel,* 35 BTA 602 (*acquiesced* 1937—1 CB 22) relied on by petitioners,—a case where the taxpayer druing 1930 actually received a duly authorized salary of $8,400.00 and on December 24, 1930, agreed with the other officers that his salary should be reduced to $4,200.00. Accordingly on that date he actually *repaid* the corporation by check $4,200.00 of the salary already paid to him. The Board of Tax Appeals, in denying the Commissioner's claim that the president was required to report as a part of his income the salary thus voluntarily returned, cites

and relies on *Stern-Slegman-Prins Co. v. Comm.,* supra.

Again the Board of Tax Appeals, in *Curran Realty Co. Inc.,* 15 TC 341 (*acquiesced* by the Commissioner 1951—1 CB 2) in a similar case, cites and relies on *Albert W. Russel,* supra.

Willis W. Clark, 11 TC 672 (recently *acquiesced* by the Commissioner in *Int. Rev. Bul. No. 11,* May 25, 1953, page 1, previous non-acquiescence withdrawn) also quotes from and relies upon *Albert W. Russel,* supra.

McConway & Torley Corporation (1943), 2 TC 593 follows the *Stern-Slegman-Prins Co.* case.

The principles enunciated by the *Stern-Slegman-Prins Co.* case have thus become incorporated in well considered decisions of the Board of Tax Appeals and the Tax Court, acquiesced by the Commissioner, and the decision of the Court of Appeals of the Ninth Circuit in the instant case is contrary in its determinations to the principles announced in the *Stern-Slegman-Prins Co.* case and followed by the Board of Tax Appeals and the Tax Court and unsettles the law as declared by these several decisions.

In *I. T.* 3960, 1949—2 C.B. 13, 15, the Bureau of Internal Revenue recognizes the principle contended by the petitioners and says:

> "In those cases in which both events, the separation from the Government service and the reemployment by the Government of the employee, occur *during the same taxable year, an adjustment of income* to be reported on Form

1040 for the taxable year *should be made* by the employee by taking into account the amount refunded to the employing agency. *(Cf. Appeal of H. C. Couch,* 1 B.T.A. 103, acquiescence, C.B. IV-1, 1 (1925); *Guy Fulton v. Commissioner,* 11 B.T.A. 641, acquiescence, C.B. VII-1, 11 (1928); *Albert W. Russel v. Commissioner,* 35 B.T.A. 602, acquiescence, C.B. 1937-1, 22; and I.T. 2743, C.B. XII-2, 103 (1933). * * *"

In *J. H. McEwen,* 6 T.C. 1018, it is said:

"Stern-Slegman-Prins Co. v. Commissioner, 79 F. 2d 289; *Albert W. Russel,* 35 B.T.A. 602; *Guy Fulton,* 11 B.T.A. 641; and *H. C. Couch,* 1 B.T.A. 103, cited by the petitioner, are not applicable, because distinguishable on the facts. It was held in such cases that compensation for services of officers of corporations for any period is subject to modification either by corporate action or by agreement at any time and from time to time during the taxable year and the amount at which compensation is finally adjusted at the close of the taxable year is the amount which the officer must report as compensation or the corporation may deduct as ordinary and necessary business expense. * * *"

II.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL INCOME TAX LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

This is a most unusual case.

The Tax Court *denied* relief to petitioners because it said that the repayment of the dividend was NOT

made pursuant to any *new agreement* between the taxpayers and the corporation.

In the 1952 Cumulative Pocket Supplement to Vol. 2 of *Mertens The Law of Federal Income Taxation,* Sec. 12.06, page 82, referring to the decision of the Tax Court in 17 T.C. 781, it is said:

> "* * * The decisions in *Albert W. Russel,* 35 B.T.A. 602 and *Curran Realty Co., Inc.,* 15 T.C. 341, were distinguished on the ground that in the Crellin case the repayment of the dividend was made by the shareholders pursuant to unilateral action of the corporation *and not pursuant to any new agreement between them and the corporation.*"

But the Court of Appeals, be it noted, *denied* them relief because it held that the repayment of the dividend WAS made pursuant to a *new agreement* between the taxpayers and the corporation.

In essence, the Court held that because the rescission was *voluntary,* it was not proper for the petitioners to exclude the rescinded and repaid dividend from gross income. Thus, it held (page 815):

> "In short, for tax purposes, it is that which the holding company could have *compelled,* not that in which the stockholders were willing to *acquiesce* which controls. * * *"

Also (page 815):

> "* * * The consent given by petitioners and relied upon by them as justifying 'rescission' was in fact no more than a *voluntary* payment by stockholders. * * *"

This case, therefore, brings to the fore an important question of Federal tax law that appears not to have been settled by this Court and that question is:

> *If, within the tax year, the taxpayer, for a valid business reason, voluntarily makes a bona fide and lawful adjustment with respect to a matter relating to his gross income, should the adjustment to his gross income be disallowed for tax purposes because it was voluntary and could not have been compelled?*

The decision of the Court of Appeals has been commented on by a number of tax publications, including the *Tax Barometer* for May 23, 1953, Vol. 10, No. 25, Par. 712, which makes this very significant comment:

> "If *salary*, etc., is waived before actual receipt on the cash basis, it has been held not to be income. See *Stern-Slegman-Prins Co.*, CA 8, 79 F. 2d 289. Nevertheless, there is no convincing demonstration that a more liberal view on the facts presented here would be a threat to the revenue—or otherwise out of order. *If a stranger doing business with a corporation saw fit to restore money received from it because of some misunderstanding or error about the original payment—to keep the corporation's good will or for some other business reason—his right to reverse the income receipt could hardly be questioned.*"

The Board of Tax Appeals and the Tax Court (with the *acquiescence* of the Commissioner of Internal Revenue) have many times ruled that the tax-

payer *was* entitled to the allowance of a deduction from gross income based upon a purely *voluntary* compromise or settlement: *Geo. C. Peterson Co.* (1925), 1 BTA 690 (acquiesced IV-1 CB, p. 3); *Manville Jenckes Co.* (1926), 4 BTA 765 (acquiesced VII-1 CB 16, 20); *Frank L. Orth* (1927), 9 BTA 249 (acquiesced VII-1 CB 24); *Peter Frees Jr.* (1928), 12 BTA 737 (acquiesced VII-2 CB 14); *H. M. Howard* (1931), 22 BTA 375 (acquiesced 1945 CB 4); *Watkins Salt Co.* (1942), 1 TC 125 (acquiesced 1943 CB 24); *Camloc Fastener Co. Inc.* (1948), 10 TC 1024 (acquiesced 1948-2 CB 1); *International Shoe Co.* (1938), 38 BTA 81 (acquiesced 1938-2 CB 17); *Curran Realty Co.,* 15 TC 341 (acquiesced 1951-1 CB 2); *Willis W. Clark,* 11 TC 672 (acquiesced Int. Rev. Bul. No. 11, 25 May 1953).

The same result was reached in the following cases: *Trippensee Mfg. Co.* (1929), 15 BTA 15; *Arabol Mfg. Co.* (1932), 26 BTA 1068; *Sylvester G. Miller* (1943), 2 TCM 495; *Brooks Packing Co.* (1947), 6 TCM 583; *Richard Downing* (1941), 43 BTA 1147; *Frederick S. Buggie* (1935), 32 BTA 581; *McConway & Torley Corp.* (1943), 2 TC 593.

In connection with all of these *voluntary* compromise and settlement cases it must be borne in mind that,

> "The compromise and settlement of a claim is * * * *not an admission that the claim is valid* but merely admits that there is a dispute and that an amount is paid to BE RID OF THE CONTROVERSY; * * *"

(15 *C.J.S.*, p. 737, par. 22.) Therefore, the fact that a claim was *compromised* and *voluntarily settled* did *not* mean that the claim which was settled was one that was *legally enforceable.*

It is respectfully submitted that this Court should settle this important question to the end that taxpayers may know to what extent their *voluntary* and *bona fide* adjustments, compromises and settlements affect their gross income.

It is clear, we think, that the decision of the Court below, *unsettles* the law.

The rule *appeared* to be well established that an adjustment involving the repayment of money, accomplished by *compromise* justifies an adjustment of gross income in the year of repayment.

Thus in the annotation to *United States v. Lewis,* supra, in 95 L. Ed. at page 563 entitled INCOME TAX: CLAIM OF RIGHT DOCTRINE AS APPLIED BY SUPREME COURT it is said at page 564:

> "It seems to be conceded that the amount of earnings repaid in a later year pursuant to a legal obligation, BONA FIDE COMPROMISE or judgment *is deductible in such year as a loss.* * * *"

And, in 2 *Mertens Law of Federal Income Taxation,* Section 12104, pages 303-304, it is said:

> "* * * The majority of the cases, however, have followed the strict application of the claim of right doctrine and have held that the repayment

> of the money in a *later year* whether by COMPROMISE or by judgment, does not affect the question of taxability of the receipts; *and here is authority for the proposition that repayment may be treated as a loss in the year in which it is made.*"

But the decision of the Court of Appeals now disallows an exclusion from gross income because it was *voluntary,* though lawfully accomplished in good faith for a legitimate business reason.

This needs to be corrected.

III.

THE SETTLEMENT OF THE QUESTION AS TO A TAXPAYER'S RIGHT TO ADJUST HIS GROSS INCOME TO REFLECT A BONA FIDE, LAWFUL SETTLEMENT, VOLUNTARILY MADE FOR A VALID BUSINESS REASON IS IMPORTANT TO THE ADMINISTRATION OF THE REVENUE LAW.

This third point is closely allied to the second point presented.

With mounting taxes, the business community is frustrated by inability to determine its tax burden in the light of lawful and usual business practices and procedures.

It is common knowledge, we think, that businessmen frequently make *voluntary* adjustments and settlements with respect to items which, but for the settlement or adjustment, would result in items to be included in their gross income.

To illustrate our point, let us suppose that a manufacturer sells a processor a certain machine for cash, resulting in a profit to the seller of $750.00. The sale is *lawful* and *fair* and *devoid of any fraud, illegality or wrongdoing.* There is *no warranty* of the fitness of the machine for the buyer's purposes.

Later in the same year the buyer finds that the volume of operations in his plant is not large enough to produce the economies which he anticipated would result from the purchase and use of the machine.

He explains the situation to the seller, informs him that the machine works perfectly, but that it isn't producing the economies which the buyer had hoped to derive from its use.

Thereupon, the seller, who certainly was not obligated to do so, *voluntarily* says to the buyer: "Send it back and I'll refund the price."

The machine is returned and the price is refunded, *all in the same taxable year.*

Can there be any doubt but that the seller is *not* required to include in his gross income for the year the profit on the sale that would have been realized had the parties not *voluntarily* rescinded the sale?

Clearly, the seller received the sale price under a *claim of right* and was not *obligated* to consent to a rescission.

A good illustration of the type of settlement which businessmen voluntarily make is found in *International Shoe Company* (1938), 38 BTA 81, which

involved a deduction of $150,000 paid to settle a suit. Here the petitioners as defendants denied the claims made against them by the plaintiff in a suit. The facts found by the Board included the fact that petitioners' counsel made an investigation of the matter and *came to the conclusion that there was no liability on petitioners' part* on account of any matter alleged in the petition. By the end of 1931 the petitioner had been subjected to much annoying publicity with respect to the suit. The Board found,

> "the petitioner's president and certain other officers were of the opinion that the publicity was harmful to the company and to its business."

The directors resolved to consult a well known attorney in St. Louis to get his advice as to what should be done. This attorney, after thorough investigation, according to the Board's finding,

> "although of the opinion that *there was no merit in the plaintiff's claim,* thought that there might be some danger of an unfortunate result if the case went to a jury. This was largely owning to the fact that the former president of the corporation was no longer living. He advised the petitioner to attempt to settle the controversy"

and it was settled for $150,000.

In its opinion, after pointing out that there was no evidence of any conspiracy or commission of any illegal act, the Board said:

> "The petitioner was, however, receiving unfavorable publicity from the suit and its officers con-

sidered that it might be advisable to pay a reasonable amount to settle the controversy."

It was held that the amount of this very substantial *voluntary settlement* was a proper deduction from gross income.

Another good illustration of a *voluntary* settlement by a businessman will be found in *Albert W. Russel,* supra, on all fours with the case at bar.

Certainly, taxpayers are entitled to learn from this Court if it is permissible, in good faith, to make *voluntary lawful adjustments for legitimate business purposes* without incurring tax disadvantage and disability and surely the law favors voluntary settlements.

The principle for which the petitioners contended before the Tax Court and the Court of Appeals has been clearly enunciated in decisions of the Board of Tax Appeals and the Tax Court; *Albert W. Russel,* supra (acquiesced 1937, 1 CB 22), a case on all fours with the case before the Tax Court; *Curran Realty Co.,* supra (acquiesced 1951, 1 CB 2); *Willis W. Clark* (1948), supra (acquiesced I.R.B. No. 11, May 25, 1953, page 1—previous nonacquiescence withdrawn).

Now, we have the decision of the Court of Appeals which declares that an adjustment, *lawfully made in good faith and for a lawful business purpose,* will *not* sustain an exclusion from gross income *because the adjustment was* VOLUNTARY *and could not be compelled,* and this decision, we respectfully submit, defi-

nitely *unsettles* the Federal tax law as it has been recognized and declared, not only by the Tax Court and the Board of Tax Appeals, but by the Commissioner himself, as shown by his many acquiescences.

Furthermore, the applicability of the *claim of right* interpretation of the tax law does not appear to have been settled by this Court with respect to cases where *the income has been both received and repaid in the same tax year.*

In *U. S. v. Lewis,* supra, this Court, after pointing out that income taxes must be paid on income received or accrued *during an annual accounting period,* says:

> "* * * *The 'claim of right' interpretation of the tax laws* has long been used to give finality to that period and is now deeply rooted in the federal tax system. * * *"

In the usual claim of right case, *two separate tax years have always been involved,*—the *earlier* year in which the item of income has been *received* and the *subsequent* year in which it has been *repaid.*

In all of these cases, the taxpayer has been charged with the income in the year of receipts, notwithstanding subsequent repayment, *because to hold otherwise would disrupt the annual accounting period essential to the tax system.*

It would appear that in all of the decisions of this Court involving the claim of right interpretation of the tax laws, down to and including its latest decision in *Healy v. Commissioner,* 97 L. Ed. (Adv.) 611, de-

cided April 6, 1953, the holdings *have been grounded upon the proposition that it would be disruptive of an ordinary collection of the revenue to violate the annual accounting system essential to the national revenue.*

In the case at bar we are dealing with the receipt and repayment of income *all in the same year,* and it is respectfully submitted that this Court should settle the question of taxability of lawfully refunded income *where there is no disruption of the principle of annual accounting* which underlies our tax system as related to the claim of right doctrine.

IV.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY IN CONFLICT WITH APLICABLE LOCAL DECISIONS.

This case involved a *rescission* accomplished under the laws of California in December, 1946, and the recovery by the corporation in December, 1946, of a dividend declared and paid to its five shareholders in June of 1946.

Referring to this *rescission* the Court of Appeal's opinion says (page 814) that the dividend having been declared, the stockholders acquired a vested right to payment and that the payment was made and that,

> "the moneys paid became the property of the stockholders, theirs to retain and do with as they chose, the holding company being WITHOUT

POWER TO RECAPTURE IT WITHOUT STOCKHOLDERS' CONSENT. *Meyers v. El Tejon Oil & Refining Co.*, 1946, 29 Cal. 2d 184, 174 P. 2d 1. * * *"

It will be observed that the California Supreme Court in the *Meyers* case (29 Cal. 2d 184, 187) holds clearly that:

"* * * Each holder of common stock acquired a vested right to the payment of the dividend, which cannot be defeated by later revocation of the dividend WITHOUT HIS CONSENT. (*Smith v. Taecker,* 133 Cal. App. 351, 352; See *Ballantine Private Corporation,* 502, 504 and cases there cited.) * * *"

Clearly, the law of California is that *a dividend may be rescinded with the stockholders' consent.*

There can be no doubt but that the five shareholders *did consent* to the rescission, because it was *stipulated* and the Tax Court *found as a fact* (T. 15) that each of the shareholders who repaid the dividend,

"*repaid said dividend in recognition of the fact that the Board of Directors would not have declared or paid said dividend,* but for having been induced to do so by such erroneous advice given to the Board of Directors, as aforesaid. * * *"

Therefore, the *consent* required by the California law *was* present.

A dividend declared is an *executory* contract and a dividend declared and paid is an *executed* contract (*California Civil Code,* Sec. 1661; *Fletcher's Cyc. of*

Corp. Perm. Ed., Sec. 5322) and, under the California decisions, an *executed* contract can be rescinded. (*Engel v. Farrell,* 75 C.A. (2d) 612, 617, 171 Pac. (2d) 588; *North Alaska etc. Co. v. Hobbs, Wall & Co.,* 159 Cal. 380, 113 Pac. 870; *Coats v. Hord,* 29 Cal. App. 115, 154 Pac. 491).

In addition, *California Civil Code,* Section 1689, provides:

> "A party to a contract may *rescind* the same in the following cases only: * * * 5. *By consent of all the other parties;* * * *"

Yet, in the face of this clear background of California law, including the California Supreme Court's decision in the *Meyers* case, that a dividend *can* be rescinded with the *consent* of the stockholders, the Court of Appeals surprisingly says (page 814):

> "* * * Rescission in this case is stated by petitioners to find warrant in Sec. 1689 of the Civil Code of California. *We, in accord with the Tax Court, do not think these provisions are applicable in the case of corporate dividends.* * * *"

Thus, the Court of Appeals has *disregarded the well established California law,* and merely says that *IT DOES NOT THINK these clearly enunciated principles are applicable to the case of corporate dividends.*

What caused the Court of Appeals so to *think,* is not revealed by its opinion and the Court did not tell us *why* it thought as it did.

In *Penn v. Robertson* (CCA 4), 115 F. 2d 167, 175, the Court said that it had no doubt "that the parties *intended a genuine rescission.* Certainly what was *done* was entirely consistent therewith." That is equally true in the case at bar.

In this same connection, the Court of Appeals for the Ninth Circuit, in dealing with the closely related subject of a *novation,* in *Humphrey v. Comm.* (CCA 9) (1937), 91 F. 2d 155, held that whether or not there was a novation is a *question of intent* and therefore a *question of fact* for the Board of Tax Appeals.

This Court will recognize that the Tax Court's findings of fact clearly show that the parties in the case at bar *intended* and *executed* a rescission in full conformity with California law.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be granted on the grounds above set forth.

Dated, Oakland, California,
August 26, 1953.

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